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No. 00-447

IN THE

Supreme Court of the United States

NEXTWAVE PERSONAL COMMUNICATIONS INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF AMICUS CURIAE OF URBAN COMM-NORTH CAROLINA, INC., DEBTOR-IN-POSSESSION, IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE*

Urban Comm-North Carolina, Inc. ("UC-NC") respectfully moves pursuant to Rule 37.2 of the Court for leave to file the accompanying brief as *amicus curiae* in support of the petition of NextWave Personal Communications Inc. ("NextWave") ("the Petition"), Docket No. 00-447, for a writ of certiorari to the to the United States Court of Appeals for the Second Circuit. The Solicitor General, attorney for Respondent herein, the Federal Communications Commission ("the FCC"), has consented to the filing of an *amicus curiae* brief, and his letter of consent has been lodged with the Court on behalf of UC-NC in this case. UC-NC has requested but not received NextWave's consent to the filing of an *amicus* brief.

As explained more fully in the attached brief under "Interest of *Amicus Curiae*," UC-NC has a critical interest in this appeal in that it stands in the same position vis-a-vis the FCC as NextWave. Like NextWave, UC-NC was a successful bidder at auction and was granted broadband Personal Communications Services ("PCS") spectrum licenses by the FCC but was, as were many other licensees, subsequently forced to seek the protection of Chapter 11 of Title 11 of the United States Code ("the Bankruptcy Code") due to the FCC's actions. The FCC has announced its intention to re-auction the licenses it granted to UC-NC in the same auction in which it intends to re-auction the licenses it granted to NextWave. Whether UC-NC and the numerous other licensees who stand in the same position as NextWave and UC-NC will be able to reorganize successfully, complete the build-out of their PCS systems and commence serving the public may well turn on the decision of this Court in the instant action.

NextWave persuasively argues in its Petition that the Court of Appeals for the Second Circuit unduly limited the wide grant of jurisdiction provided to District Courts and, by reference, Bankruptcy Courts, in 28 U.S.C. § 1334(b). In the accompanying *amicus* brief, UC-NC argues, in addition, that (1) a regulatory agency which undertakes to engage in commercial transactions with non-governmental entities should be subject to the same rules as any other entity engaged in commercial transactions, including the rules contained in the Bankruptcy Code; (2) assuming *arguendo* that the Bankruptcy Court does not have jurisdiction to review regulatory action, it does have jurisdiction to determine whether it has jurisdiction by scrutinizing the nature of the agency action and in the instant case concluded correctly that the FCC's rescheduling of NextWave's licenses for re-auction had no regulatory foundation; and (3) the Bankruptcy remedies here invoked were designed to, and do, provide the perfect solution for situations such as the one in which NextWave and UC-NC have been placed.

Wherefore, UC-NC respectfully asks that the Court permit UC-NC to submit the accompanying *amicus curiae* brief in support of the Petition.

Respectfully submitted,

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INTEREST OF AMICUS CURIAE[1]

Amicus Curiae, Urban Comm-North Carolina, Inc. ("UC-NC"), a small, start-up business formed by a group of minority individuals, has an interest in the Petition because it, just as the Petitioner, NextWave Personal Communications Inc. ("NextWave"), is a holder of broadband Personal Communications Services ("PCS") C Block spectrum licenses obtained at auction[2] and it, just as NextWave, and for the same reasons (*see* Petition, p. 10), was foreclosed from raising the capital necessary to meet its construction costs and payment obligations to the FCC and, therefore, found it necessary to seek the protection of Chapter 11 of Title 11 of the United States Code ("the Bankruptcy Code").[3]

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1. The Solicitor General has given his consent to the filing of this brief and, in compliance with Supreme Court Rule 37.2, his letter of consent has been lodged with the Court. *Amicus* has sought but not obtained the consent of Petitioner to the filing of the brief. Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for any party in this case authored this brief in whole or in part and that no monetary contribution to the preparation or submission of this brief was received from any person or entity other than the *amicus curiae* or its counsel.

2. In May of 1996, after 184 rounds of bids, Urban Communicators PCS Limited Partnership ("UCPCS"), the parent of UC-NC's parent, Urban Comm-Mid-Atlantic, Inc., was the high bidder at a Federal Communications Commission ("FCC") auction for the right to apply for C Block licenses within ten basic trading areas ("BTAs") in North Carolina. UCPCS's bids, which totaled $74.6 million, were consistent in amount with bids for licenses in similar BTAs throughout the country. UCPCS assigned its C Block license applications to UC-NC. The FCC conditionally granted the licenses to UC-NC, which made the required downpayment and later executed notes payable to the FCC in the amount of the then outstanding balance.

3. 11 U.S.C. § 101, *et seq.*, as amended.

Thereafter, UC-NC commenced an avoidance action by adversary complaint against the FCC to value the licenses as at the time UC-NC incurred the obligations to the FCC and avoid the difference as a fraudulent conveyance.[4]

As it did in NextWave's action, the FCC moved in the District Court to withdraw the reference of the Chapter 11 case to the Bankruptcy Court and to dismiss the avoidance action. The District Court denied the motion to withdraw and left it to the Bankruptcy Court to decide the motion to dismiss.[5] Upon remand of its Chapter 11 case to the Bankruptcy Court, the Bankruptcy Judge advised the parties that he would defer decision on the FCC's motion to dismiss UC-NC's adversary proceeding pending the determination by the U.S. Court of Appeals for the Second Circuit of the FCC's appeal in the *NextWave* action. After the Second Circuit's decision,[6] Honorable Richard L. Bohanon, U.S. Bankruptcy Judge, continued the deferral pending this Court's determination of NextWave's petition for a writ of certiorari.[7] When that petition was denied,[8] the FCC asked

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4. *Urban Comm-North Carolina, Inc. v. FCC (In re Urban Comm-North Carolina, Inc.)*, Ch. 11 Case No. 98-B-10086, Adv. No. 99/8125A (Bankr. S.D.N.Y.).

5. *Urban Comm-North Carolina, Inc. v. FCC (In re Urban Comm-North Carolina, Inc.)*, No. 99 Civ. 2618 (RMB) (S.D.N.Y. July 20, 1999).

6. *FCC v. NextWave Personal Communications, Inc. (In re NextWave Personal Communications, Inc.)*, 200 F.3d 43 (2d Cir. 1999).

7. *NextWave Personal Communications Inc. v. FCC*, 68 U.S.L.W. (U.S. June 9, 2000) (No. 99-1980).

8. *NextWave Personal Communications Inc. v. FCC*, 69 U.S.L.W. 3257 (U.S. October 10, 2000) (No. 99-1980).

Honorable Robert E. Gerber, U.S. Bankruptcy Judge, to dismiss the adversary proceeding on the authority of that decision. UC-NC, in turn, requested that any action on the FCC's motion to dismiss be deferred pending this Court's decision of NextWave's present petition for certiorari and, if the Petition is granted, this Court's decision on the merits. UC-NC's adversary proceeding and the FCC's motion to dismiss it are still pending.

Upon obtaining a copy of a public notice released on September 6, 2000, by the Wireless Telecommunications Bureau of the FCC ("the Public Notice"),[9] UC-NC learned that the FCC had decided to re-auction UC-NC's licenses.

Whether UC-NC can successfully reorganize, complete the build-out of its PCS system and supply to a technology-deprived population in North Carolina the wireless communication services Congress wanted to foster, or will face liquidation, may well turn on the decision by this Court in the instant action. The importance of the issues presented in the Petition and in this brief is attested to by the fact that a number of C Block licensees, representing a significant percentage of the successful bid prices and licenses auctioned, have filed for bankruptcy protection or have defaulted on their payments to the FCC. Due to no fault of their own, and largely due to the irresponsible and self-defeating manner in which the FCC conducted the license auctions, as discussed below, they were unable to raise the capital required to construct their systems and meet their payment obligations to the FCC. At stake here is the future of the licensees, as well as the timeliness with which the most technology-deprived parts of the public will have access to PCS services.

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9. *C and F Block Broadband PCS Spectrum Auction Scheduled for November 29, 2000, Rescheduled for December 12, 2000; Revised List of Available Licensees; Comment Sought on Reserve Prices or Minimum Opening Bids and Other Procedural Issues*, Public Notice, No. DA 00-2038 (September 6, 2000).

SUMMARY OF ARGUMENT

The issue framed in the lower courts is whether the fact that the FCC conducted the C Block auctions pursuant to its mandate to allocate those licenses so as to assure the most efficient use of spectrum immunizes the FCC from the application of the provisions of the Bankruptcy Code. The FCC contends that the auction bid prices must be timely paid, at pain of forfeiture of the licenses as well as the hundreds of millions of dollars paid by the successful C Block bidders, in order to accomplish the FCC's regulatory purpose of ensuring the most efficient and prompt spectrum use; that its determination in that regard is regulatory; and that the Bankruptcy Court lacks jurisdiction to countermand that decision. The Second Circuit accepted the FCC's contentions. UC-NC submits that NextWave's Petition should be granted and, on appeal, the Second Circuit's decision reversed because, as persuasively shown in the Petition, the Bankruptcy Court has jurisdiction to review all actions of the FCC in the course of the administration of an estate and because:

> (1) regardless of any asserted regulatory purpose for the FCC's insistence on full payment for the licenses it sold to NextWave, its actions in that respect must be held to be subject to the protective remedies of the Bankruptcy Code[10] inasmuch as the FCC chose to regulate by entering into

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10. As applicable here, the automatic stay of the Bankruptcy Code for the protection of the property of the estate, (11 U.S.C. § 362(a)(1),(3)-(6)), the debtor's right to cure any default in post-petition payment of debts, (11 U.S.C. §§ 1123(a)(5)(G) and 1124(2)(A)), and the prohibition against payment to creditors during the pendency of the bankruptcy proceedings without approval of the bankruptcy court (11 U.S.C. § 363). *See In re NextWave Personal Communications Inc.*, 244 B.R. 253, 266-76 (Bankr. S.D.N.Y. 2000), *mandamus granted, In re FCC*, 217 F.3d 125 (2d Cir. 2000).

commercial transactions and thereby necessarily assumed the same responsibilities as any other participant in a commercial transaction ("I" below);

(2) in any event, the FCC's insistence on full and timely payment from bidders who were deprived of the ability to pay by the FCC's own actions manifestly does not serve to further the Congressional intent to assure efficient and prompt use of spectrum and thus is not in fact regulatory action ("II" below); and

(3) the remedies of the Bankruptcy Code provide the ideal solution to the conundrum with which the parties — the bidders *and* the FCC — are faced ("III" below).

ARGUMENT

I. The FCC'S Cross-Over

In consonance with prevailing trends towards deregulation and reliance on market forces instead of presumed bureaucratic wisdom, and with a view towards containment of administrative costs and realization of revenue from the national resources,[11] Congress authorized

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11. President Clinton proposed in his budget submitted to Congress [for fiscal year 1994] that the FCC be given authority to use competitive bidding as a source of revenues and as a means of improving the spectrum assignment process. . . . In many ways, President Clinton[']s budget takes a position similar to the Bush and Regan administrations. It has long been the view of NTIA and the FCC that the

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the FCC to allocate radio spectrum licenses by competitive bidding rather than, as in the past, by administrative adjudication or random allocation at no charge to the licensee for the license.[12] In carrying out this mandate — selling licenses at their full commercial value and structuring the sale as a typical commercial transaction — the FCC placed itself, in respect of those transactions, on the same plane as other sellers or financiers of goods, services or other things of value. It should make no difference whether the FCC's action in selling licenses to the highest bidder is considered to be regulatory action, as the Second Circuit would have it. The FCC, by design, adopted the form and substance of an ordinary commercial lending transaction, and the FCC's actions as a commercial lender give rise to the same set of concerns as all other commercial transactions. Among those concerns are the consequences of financial distress experienced by a participant in the process and the need to provide both for the preservation of financially embarrassed but economically viable enterprises and for the protection of their creditors and investors. The Bankruptcy Code provides those protections.

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> Commission[']s current process of spectrum assignment by lottery and comparative hearings is flawed. This view holds that not only do current licensing procedures often result in arbitrary and inefficient spectrum management decisions, but also, by assigning spectrum to non-federal licensees without receiving compensation, the government is failing to manage wisely one of the nations most valuable national resources.

H.R. Rep. No. 103-111, pt. 2 (1993).

12. *See* Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 6002, 107 Stat. 312, 387-392 (1993), amending Section 309 of the Communications Act of 1934 (codified in relevant part at 47 U.S.C. § 309(j)).

By crossing over into the commercial financing arena and requiring successful bidders such as NextWave and UC-NC to pay full commercial value for the PCS licenses and then financing that acquisition, the FCC subordinated itself to the contract and other laws that regulate the affairs of commercial transactions. Put differently, the FCC could not responsibly or reasonably determine that it could serve a regulatory purpose by entering into a full-fledged commercial transaction without also making the determination that it must accept all of the concomitants of a commercial transaction — of which the bankruptcy laws is one.

The FCC understands full well that the position it has taken in its litigation with C Block licensees is tenuous. It has lobbied Congress extensively during the pendency of this litigation to obtain an exemption from the Bankruptcy Code for its actions as a commercial lender which it claims to possess already and has sought retroactive application of the statute it has proposed for the purpose of nullifying the actions brought by C Block licensees.[13]

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13. [Proposed] SEC. 618. Section 309(j)(8) of the Communications Act of 1934 is amended by adding new paragraph (D) as follows:

(D) PROTECTION OF INTERESTS. —

(i) Title 11, United States Code, or any otherwise applicable Federal or state law regarding insolvencies or receiverships, or any succeeding Federal law not expressly in derogation of this subsection, shall not apply to or be construed to apply to the Commission or limit the rights, powers, or duties of the Commission with respect to (a) a license or permit issued by the commission under the subsection or a payment made to or a debt or other obligation owed to the Commission relating to or rising from such a license or permit,

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Congress has repeatedly refused to grant the exemption to the FCC.[14]

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> (b) an interest of the Commission in property securing such a debt or other obligation, or (c) an act by the Commission to issue, deny, cancel, or transfer control of such a license or permit.
>
> (ii) Notwithstanding otherwise applicable law the Commission shall be deemed to have a perfected, first priority security interest in a license or construction permit issued by the Commission under this subsection and the proceeds of such a license or permit for which a debtor or other obligation is owed to the commission under this Subsection.
>
> (iii) This paragraph shall apply retroactively, including to pending cases and proceedings whether on appeal or otherwise.

S. 1217, 106th Cong. § 618 (1999).

14. The proposed amendment (footnote 13, supra) was included in S. 1217, a fiscal year 2000 appropriation bill for the Departments of Commerce, Justice, and State, the Judiciary, and related agencies, which was passed by the Senate on July 22, 1999. *See* 145 Cong. Rec. S9068 (July 22, 1999). Under unanimous consent agreement, S. 1217 was not engrossed but ordered to be held until the House companion measure, H.R. 2670, 106th Cong. (1999), was received, and once received H.R. 2670 was to be amended by striking everything after the enacting clause and inserting S. 1217 in lieu thereof, and upon passage of H.R. 2670 by the Senate, S.1217 was to be vitiated and indefinitely postponed. *See* 145 Cong. Rec. S9046 (July 22, 1999). The Senate passed its amended version of H.R. 2670 on September 8, 1999, and passage of S. 1217 was subsequently vitiated and indefinitely postponed. *See* 145 Cong. Rec. S10540 (September 8, 1999); 145 Cong. Rec. D949-50 (September 8, 1999).

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II. No "Regulatory Purpose" was Served by the FCC's Attempted Forfeiture of the Licenses

After the initial auction of the C Block licenses was concluded in May 1996, but before the licenses were issued by the FCC to the successful bidders and financing could be obtained, the FCC, in June 1996, announced that it would auction three blocks of spectrum (the D, E and F Blocks) in the same BTAs as, and competing with, the C Block licenses.[15]

The ensuing auctions for additional licenses of PCS spectrum, commencing in August 1996 and ending in January 1997,[16] flooded the market for PCS spectrum and drove down the value of PCS licenses. While the successful bids for C Block licenses had averaged $1.33 per MHz-Pop[17] for the

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The House version of H.R. 2670, which was passed on August 5, 1999, *see* 145 Cong. Rec. H7383-7384 (August 5, 1999); 1999 House Roll No. 387, did not contain the provision. The bills went to conference, and the provision was not included in the resultant conference report, *see* H.R. Rep. No. 106-398 (1999), which was agreed to by both the House and Senate on October 20, 1999, *see* 145 Cong Rec. D1166 (October 20, 1999). The enrolled bill was presented to the President on October 22, 1999, *see* 145 Cong. Rec. H10768 (October 25, 1999), and vetoed for sundry reasons on October 25, 1999, *see* 145 Cong. Rec. H10835 (October 26, 1999).

15. *See NextWave*, 200 F.3d at 47.

16. *See NextWave Personal Communications, Inc. v. FCC (In re NextWave Personal Communications, Inc.)*, 235 B.R. 277, 283 (Bankr. S.D.N.Y. 1999), *aff'd*, 241 B.R. 311 (S.D.N.Y. 1999), *rev'd and remanded*, 200 F.3d 43 (2d Cir. 1999).

17. $/MHz-Pop is a generally accepted industry measurement standard. *See Next Wave*, 200 F.3d at 47.

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main auction ending May 6, 1996, and $1.94 per MHz-Pop for a re-auction in July 1996, the average of the successful bids for the new licenses in the same BTAs for which C Block licenses were granted was only $.33 per MHz-Pop.[18] This difference in the bids in identical markets demonstrates that the FCC, by auctioning additional PCS spectrum immediately after the C Block auctions closed and before the licenses had been issued, drastically depressed the market value of all such licenses. Predictably, the C Block licensees found that, in light of the disparate values placed on comparable PCS spectrum licenses, financing for the licenses and the build-out of their PCS systems could not be obtained. In the words of United States Bankruptcy Judge Adlai S. Hardin, Jr.,

> NextWave was not the only C block licensee to find the public capital markets closed. Approximately $1.6 billion of public financing was sought by C block licensees after the award of their licenses. Not one dollar of this $1.6 billion was raised in the public market. To this date [May 1999], nearly three years after the 1996 auction and re-auction, less than 10% of the C block

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> The MHz, or megahertz of radio frequency, in question determines the carrying capacity of a block of wireless spectrum. . . . One 'Pop' represents 1000 persons within the geographic area covered by a particular licensing block. $/MHz-Pop therefore measures the amount paid for a license that would allow the provision of a particular level of communications data to a particular number of people.

Id. at 47 n.4.

18. *NextWave*, 235 B.R. at 284.

> licences awarded by the FCC have been placed in service.[19]

The FCC, recognizing its error, decreed a payment moratorium in order to determine how to remedy the situation it had created. After the expiration of the payment moratorium, however, the FCC decided to insist upon full payment of auction bids for any licenses the license holders chose to keep.[20] The licenses for which the holders, for the reasons mentioned above, were unable to make full and timely payment (a significant portion of those awarded) were scheduled by the FCC for re-auction.

Having first repeated (again without any consideration of the overriding effect of 28 U.S.C. § 1334(b) and 28 U.S.C. § 157) its prior holding that the Bankruptcy Court did not have jurisdiction to review actions taken by the FCC in its regulatory capacity,[21] the Second Circuit accepted the FCC's contention that the FCC had acted in a regulatory capacity when it issued the Public Notice. In the words of the Second Circuit:

> The FCC's decision to re-auction the Licenses [defined] previously granted to NextWave is one that implicates the conditions of licensure, in itself a circumstance sufficient to require the bankruptcy court's deference. Moreover, the regulatory purpose for requiring payment in full — the identification of the candidates having the best prospects for prompt and efficient exploitation of

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19. *Id.* at 286.

20. *NextWave*, 200 F.3d at 48.

21. *In re FCC*, 217 F.3d 125, 135 (2d Cir. 2000).

> the spectrum — is quite obviously served in the same way by requiring payment on time.[22]

In support of that holding, the Second Circuit pointed to the language in its previous decision "detailing the regulatory purpose behind the FCC's general insistence on payment according to the terms set at auction, so that the 'bids constitute a reliable index of the bidders' commitments to exploit and make the most of the license at issue.' "[23]

The plain fact is that the inability of NextWave and those standing in the same position as NextWave to make timely payment of the bid prices for the PCS licenses had nothing to do with any lack of commitment to exploit and make the most of their licenses but had everything to do with the FCC's conduct of the subsequent auctions of PCS spectrum. The C Block licensees failed to raise the necessary financing because the FCC had not been sensitive to the needs of the winning bidders to go into the public markets to raise the necessary capital, a fact inherent in the very criteria by which they were chosen. The FCC knew or should have known when it auctioned the C Block licenses to minimally capitalized small emerging businesses and financed the winning bids, that, by definition, the ability of the winning bidders to pay (i.e., raise the necessary capital in a competitive capital market) would wax and wane with the volatile market for public financing. Nonetheless, the FCC proceeded to conduct subsequent auctions of PCS spectrum with complete disregard of this fact and scheduled subsequent auctions in a manner that virtually assured that the C Block bidders would be unable to raise the necessary capital. The inability to raise the necessary capital and the need for relief under Chapter 11 would have been the experience of any typical small business meeting the eligibility criteria for the C Block

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22. *Id.*

23. *Id.* at 136.

licenses and was, in fact, the experience of many of those who did bid successfully.

The Bankruptcy Court saw clearly that the claimed regulatory purpose for the FCC's cancellation of the licenses was nonexistent. Even assuming *arguendo* that review of true regulatory action is beyond the jurisdiction of the Bankruptcy Court (NextWave has demonstrated in the Petition that it is not), that court had jurisdiction to determine in the first instance whether the action of the FCC was truly regulatory. In holding that the Bankruptcy Court was foreclosed from making that determination by the FCC's contention that its insistence on timely payment was a "regulatory condition,"[24] the Second Circuit disregarded the "primordial element of our jurisprudence . . . that federal courts have jurisdiction to determine whether they have subject matter jurisdiction."[25]

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24. *Id.* at 135.

25. *Shannon v. Shannon*, 965 F.2d 542, 545 (7th Cir. 1992); *see also United States v. Shipp*, 203 U.S. 563, 573 (1906) (Holmes, J.); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 118 (1998) (Stevens and Souter, JJ., concurring).

As this brief was going to the printers, the United States Court of Appeals for the Fifth Circuit announced its decision of *In re GWI PCS I Inc. v. United States*, __ F.3d __, 2000 U.S. App. LEXIS 26062 (5th Cir. October 20, 2000), in which that court affirmed decisions of the lower courts avoiding a debtor-licensee's obligation to the FCC. The Fifth Circuit acknowledged that it was within the Bankruptcy Court's jurisdiction to enjoin the FCC from revoking the licenses and avoiding the majority of the obligations under the notes in order to preserve property of the estate and further the reorganization plan, citing 11 U.S.C. § 541. The court also held that 11 U.S.C. § 106 renders the United States and the FCC subject to the bankruptcy proceedings and that 28 U.S.C. §§ 158 and 1334(b) "grant the bankruptcy court jurisdiction to consider the Debtor's avoidance claims," although allowing, by the way of *dictum*, for the possibility that the Bankruptcy Court committed the error of taking unto itself a quasi-regulatory function held by the FCC. *GWI*, 2000 U.S. App. 26062 at 37 and n.29.

III. The Salutary Effect of the Bankruptcy Remedies

In structuring and scheduling the C Block and subsequent license auctions, the FCC's directive from Congress was to ensure that those licenses were awarded to "small, emerging businesses".[26] Unquestionably, the FCC failed in that mission. Of the C Block licences allocated by Congress to small, emerging businesses, precious few have been put into service by such an entity. On the contrary, because of the strategy pursued by the FCC, the C Block licensees found themselves obligated to pay the FCC sums that vastly exceeded the actual market value of those licenses, as demonstrated by the results of the subsequent auctions and the refusal of the financial community to invest capital in C Block licensees. The C Block licensees are in need of a remedy that will place them in the position in which they would have been if the Congressional mandate had been carried out.[27] UC-NC respectfully submits that the

26. *See NextWave Personal Communications, Inc. v. FCC (In re NextWave Personal Communications, Inc.)*, 241 B.R. 311, 314 (S.D.N.Y. 1999), *rev'd and remanded*, 200 F.3d 43 (2d Cir. 1999).

27. Section 548 of the Bankruptcy Code is one of the most powerful tools available to the bankruptcy trustee. It provides after the fact protection to the debtor's creditors, by undoing a transaction engaged in by the debtor, in which a transfer of the debtor's property was made, or an obligation was incurred by the debtor, which . . . was made while the debtor was in a precarious financial condition, and the transaction did not provide the debtor with a reasonably equivalent value in exchange for the item transferred or the obligation incurred. The statutory language was drafted broadly to encompass virtually any type of transaction. Any act that has the effect of diminishing the value of the debtor's estate from the standpoint of creditors can be subject to a fraudulent transfer analysis.

5 *Collier On Bankruptcy*, ¶ 548.01 (Lawrence P. King ed., 15th ed. revised 2000).

bankruptcy remedies curing post-petition defaults and staying and postponing payments to creditors are perfectly suited to accomplish the Congressional purpose, as they will permit the successful bidders to proceed to build out their systems and start serving the public.

CONCLUSION

For the reasons stated above and in the Petition, a writ of certiorari should be granted, and, upon the appeal, the decision of the Court of Appeals for the Second Circuit should be reversed.

Respectfully submitted,

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